

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE )  
APPLICATION TO CHANGE A WATER ) FINAL  
RIGHT NO. 76L-G(W)142365-00 ) ORDER  
BY WESLEY E. CROSS )

\* \* \* \* \*

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained the November 15, 1999, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Application to Change Appropriation Water Right 76J-G(W)142365 is DENIED.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as

**CASE #142365**

part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the proceedings to the district court.

Dated this 10<sup>th</sup> day of JANUARY, 2000.  
~~December, 1999.~~



Jack Stults, Administrator  
Water Resources Division  
Department of Natural  
Resources and Conservation  
PO Box 201601  
Helena, MT 59620-1601

**CASE # 142365**

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was served on all parties listed below on this 11<sup>th</sup> day of January 2000, ~~December, 1999~~, as follows:

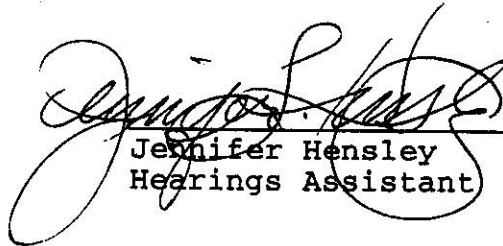
WESLEY E CROSS  
898 COUNTY ROAD 382  
PLAINS MT 59859

MORLAND AND DORLA B. NEIMAN  
211 CAMAS CREEK ROAD  
PLAINS MT 59859

MARY D AND WAYNE C CROSS  
691-CR 382  
PLAINS MT 59859

KURT HAFFERMAN, MANAGER  
KALISPELL WATER RESOURCES  
REGIONAL OFFICE  
109 COOPERATIVE WAY, SUITE 110  
KALISPELL MT 59901-2387

NANCY ANDERSEN, CHIEF  
WATER RIGHTS BUREAU  
DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION  
PO BOX 201601  
HELENA MT 59620-1601

  
Jennifer Hensley  
Hearings Assistant

CASE # 142365

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE	)	
APPLICATION FOR CHANGE OF	)	PROPOSAL
APPROPRIATION WATER RIGHT	)	FOR
76L-G(W)142365-00 BY	)	DECISION
WESLEY E. CROSS	)	

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held on August 10, 1999, in Plains, Montana, to determine whether an authorization to change appropriation water right should be issued to Wesley E. Cross to add a place of use to the water right claimed by Statement of Claim 43D-W142365-00.

APPEARANCES

Wesley E. Cross (Applicant) appeared at the hearing in person.

Morland Neiman (Objector) appeared at the hearing in person.

Charles D. Neiman appeared as a witness for Morland Neiman.

Objectors Mary D. and Wayne C. Cross did not appear at the hearing and are therefore in default and no longer parties to this case.

EXHIBITS

Applicant offered no exhibits for the record. Objector Neiman offered one exhibit which was accepted without objection.

Wesley E. Cross  
App. 76L-G(W)142365-00  
Proposal for Decision

Page 1

CASE # 142365

Objector Neimen's Exhibit 1 is a copy of an aerial photograph which has been enhanced to show two ponds circled in red and a cross-hatched area identifies the legal description of the claimed point of diversion. Applicant's pond is shown as an area encircled in red in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$  Section 22, Township 20 North, Range 24 West, Sanders County.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make to following:

#### FINDINGS OF FACT

1. Application for Change of Appropriation Water Right 76L-G(W)142365-00 in the name of and signed by Wesley E. Cross was filed with the Department on January 14, 1999, at 3:33 p.m.

2. Pertinent portions of the application were published in the *Lake County Leader*, a newspaper of general circulation in the area of the source, on May 6, 1999. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the application. Three objections were received by the Department against this application. Applicant was notified of the objections by a letter from the Department dated June 3, 1999. One of the objections was a jurisdictional objection by the Confederated Salish and Kootenai Tribes. The other two alleged adverse effect to existing water rights and the

validity of the underlying water rights since mistakes were made on the claim filed by a previous owner. (Department file.)

3. Applicant seeks to add 150 acres located in the W½E½ of Section 22 to the water right claimed by Statement of Claim 76L-W142365. Applicant would not increase the flow rate to irrigate the new acreage; however, he would lengthen the period of use. Lengthening the period of use would mean using more water.

Based upon the foregoing Finding of Fact and upon the record in this matter, the Hearing Examiner makes the following:

#### CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing and all substantive procedural requirements of law and rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2. Mont. Code Ann. § 85-2-307 (1999).

2. An application for change cannot be used to appropriate additional water even if there is no adverse effect. Additional water use constitutes a new appropriation of water and an application for beneficial water use permit must be filed with and permitted by the Department before such an appropriation is made.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

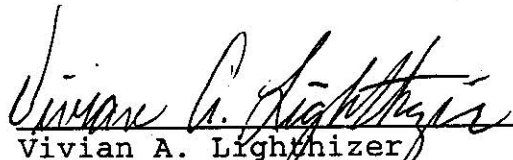
PROPOSED ORDER

Application to Change Appropriation Water Right 76J-  
G(W)142365-00 is DENIED.

NOTICE

This Proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. An party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the Proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after the service of the exception and copies must be sent to all parties. No new evidence will be considered. No final decision will be made until after the expiration of the time period for filing exception, and due consideration of timely exceptions, responses, and briefs.

Dated this 15th day of November, 1999.

  
Vivian A. Lighthizer  
Hearing Examiner  
Water Resources Division  
Department of Natural Resources  
and Conservation  
PO Box 201601  
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This certifies a true and correct copy of the Proposal for Decision was served on all parties listed below this 16<sup>th</sup> day of November, 1999.

WESLEY E CROSS  
898 COUNTY ROAD 382  
PLAINS MT 59859

MORLAND AND DORLA B. NEIMAN  
211 CAMAS CREEK ROAD  
PLAINS MT 59859

MARY D AND WAYNE C CROSS  
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